No. 90-1038 (8)

In The

Supreme Court of the United States

October Term, 1990

THOMAS CIPOLLONE, Individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF OF THE STATES OF MINNESOTA, ALABAMA, ARIZONA, CONNECTICUT, IDAHO, MAINE, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO AND WASHINGTON IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

The amici states have a definite and substantial interest in retaining common law remedies to assist them in promoting the health and welfare of their citizens through the incentives which common law damage claims provide for manufacturers to act responsibly toward the consumers of their products. In addition, the

amici states have a definite and substantial interest in providing their citizens injured by cigarette smoking with common law remedies in state and federal courts to gain compensation for their injuries from manufacturer wrongdoers.[1]

SUMMARY OF ARGUMENT

The court below determined that the Federal Cigarette Labeling and Advertising Act (hereinafter "Act"), 15 U.S.C. §§ 1331-1341 (1982 and Supp. II 1984), impliedly preempts state common law actions premised on the inadequacy of a cigarette manufacturer's health warnings, the propriety of cigarette advertising practices, suppression of cigarette-related health information and intentional deception of consumers regarding the nature and extent of the health hazards of smoking. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 581-82 (3d Cir. 1990) (*Cipollone III*). As a consequence, vital state functions advanced by state common law are greatly impaired. The salutary role of common law in helping to safeguard the health of citizens is vitiated by the *Cipollone III* preemption decision. Furthermore, the function of common law to provide injured citizens with compensation is significantly eroded.

The preemption decision of *Cipollone III* is based merely on Congressional silence with respect to any

[1] This brief is filed on behalf of the *amici* states by their respective Attorneys General pursuant to Supreme Court Rule 37.5.

intent to preempt state common law actions. However, a preemption decision made on such a slender basis and with such major consequence to significant state interests undermines federalism and violates the separation of powers doctrine. Therefore, the judgment of the court below should be reversed.

ARGUMENT

I. THE *CIPOLLONE III* PREEMPTION DETERMINATION IMPAIRS SIGNIFICANT STATE FUNCTIONS.

Cipollone III's preemption holding deprives the states of a traditional and significant mechanism to promote the health of their citizens and to compensate their citizens for harm caused by cigarette manufacturers. In *Cipollone III*, the Third Circuit reaffirmed its prior determination that

> the Act preempts . . . state law damage actions relating to smoking and health that challenge either the adequacy of warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. . . . [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

Cipollone III, 893 F.2d at 582 (quoting *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986) (*Cipollone II*), *cert. denied* 484 U.S. 976 (1987). In upholding the district

court's interpretation of the scope of its prior preemption holding, the Third Circuit stated that the district court correctly barred

> plaintiff's failure to warn, fraudulent misrepresentation, express warranty, and conspiracy to defraud claims to the extent that they sought to challenge the defendants' advertising, promotional, and public relations actions after January 1, 1966.

Id.[2]

An important function of state common law is to serve as a "prophylactic factor . . . preventing future harm . . . . When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm." *Prosser and Keeton on the Law of Torts*, § 4 at 25 (W. Keeton, 5th ed. 1984).

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[2] The preemption provision of the Federal Cigarette Labeling and Advertising Act ("Act") states:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334 (1982).

The Third Circuit acknowledged that this provision of the Act does not "clearly encompass[ ] state common law." *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 185 (3d Cir. 1986).

The states are vitally interested in assuring the good health of their citizens generally and, specifically, in minimizing the harmful consequences of cigarette smoking. Each state has created a department of health or a division of another agency to protect and improve the health of citizens. *See The Council of State Governments*, 28 *The Book Of The States: 1990-91* at 479 (1990); *see also* Minn. Stat. § 144.05 (1990) (state health commissioner "responsible for the development and maintenance of an organized system of programs and services for protecting, maintaining, and improving the health of the citizens.").

Toward the end of minimizing the health hazards of cigarette smoking, most states have enacted one or more measures to restrict cigarette smoking.[3] These include restrictions on smoking in public or private places, restrictions on cigarette sales to minors, restrictions on distribution of cigarette samples, restrictions on sales of cigarettes in vending machines and licensing requirements for cigarette sales. *See* Tobacco-Free America Legislative Clearinghouse, *State Legislated Actions on Tobacco Issues* (1990); *see also* Minnesota Department of Health, *The Minnesota Tobacco-Use Prevention Initiative: 1987-1988*, at 3 (1989) ("Preventing the death, disease, economic loss, and disability that smoking exacts each year is a top public health priority in Minnesota.").

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[3] Missouri and Wyoming are the only states without restrictions on smoking or distribution of cigarettes, according to a recent compilation. Tobacco-Free America Legislative Clearinghouse, *State Legislated Actions on Tobacco Issues At-A-Glance* (1990).

The promotion of non-smoking is part of the states' primary and historic role, based on its police powers, of regulating for the health and safety of its citizens. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("[A] state has broad powers to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power.").

State common law, by providing for damage compensation claims, plays an important supplementary role in promoting the health of citizens because it encourages manufacturers to produce a safer product and design better consumer warnings regarding the dangers of cigarette smoking. *See Silkwood v. Kerr-McGee Corp., Inc.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting) ("[T]he prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an indirect impact on daily operations of a nuclear facility."). Thus, state common law is an additional tool, complementary to statutory enactments, to minimize the harmful health effects of cigarette smoking on their citizens.[4]

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[4] This indirect effect of a judgment under common law requiring a cigarette manufacturer to pay damages does not violate the Act's express preemption provision because it does not require the manufacturer to add any additional warning to a cigarette package and does not impose any requirement on the manufacturer with respect to advertising or promotion. A

(Continued on following page)

The sweeping preemption determination of *Cipollone III* substantially erodes the role of state common law in promoting citizens' health by prohibiting a number of potential common law claims against manufacturers. It, therefore, hampers the states in accomplishing the vital and traditional function, based on the police power, of protecting citizens' health.

The *Cipollone III* preemption decision also burdens the traditional state function, also based on the police power, of providing a mechanism for compensation of injured citizens. The primary purpose of a tort law action is to compensate a victim for damage suffered at the expense of the wrongdoer. *Prosser and Keeton on the Law of Torts*, § 2 at 7 (W. Keeton, 5th ed. 1984).

The historic function of providing tort remedies to injured citizens in its state courts is a central state function. Every state has a judicial system that devotes substantial resources to the adjudication of tort law claims. Determining which causes of action will be recognized is an aspect of the states' fundamental police power. *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 1328, 121 N.W.2d 361, 366 (1963) ("power to deprive one of a common law action is vested in the legislature under its police power . . . . "); *accord Mays v. Liberty Mutual*

(Continued from previous page)

damages action provides an incentive for a manufacturer to voluntarily take a variety of actions designed to encourage fuller consumer understanding, but it does not require them.

Insurance Co., 323 F.2d 174, 178 (3d Cir. 1963).[5] Thus, "the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law." *Cipollone II*, 789 F.2d at 186.

By preempting common law remedies, the Third Circuit's decision cuts deeply into the traditional state function of providing a mechanism for compensating injured citizens.

II. PREEMPTION BASED ON CONGRESSIONAL SILENCE REGARDING ITS INTENT UNDERMINES FEDERALISM AND VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The court below determined that particular common law actions against cigarette manufacturers are impliedly preempted on the basis of what most generously can be characterized as silence in the statute and legislative history. To find preemption of central state functions on such a slender basis undermines the principle of federalism that the states and the federal government are dual sovereigns and thrusts the courts into the legislative arena in violation of the separation of powers doctrine.

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[5] Furthermore, a state tort law system "with its reliance on jury verdicts and its emphasis on public accountability has served as a deeply democratic symbol of a state's commitment to individualized justice." Wells, *Tort Law As Corrective Justice: A Pragmatic Justification For Jury Adjudication*, 88 Mich. L. Rev. 2348, 2349 (1990).

A. Congress Did Not Clearly Intend To Preempt State Common Law Remedies.

This Court recently reaffirmed that "[p]re-emption fundamentally is a question of congressional intent . . . ." *English v. General Electric Co.*, ___ U.S. ___, ___, 110 S. Ct. 2270, 2275 (1990). Congress has often used explicit language to express its intent to preempt or not preempt state common law. *See, e.g.*, 12 U.S.C. §§ 1715z-17(d) and 1715z-18(e) (1988) (certain insured mortgages not subject to specified common law limitations); 17 U.S.C. § 301(c) (1988) (no preemption of common law with respect to sound recording copyrights for specified time); 29 U.S.C. §§ 653(b)(4) (1988) (workman's compensation common law not preempted) 29 U.S.C. § 1144(a), (c)(1) (1988) (preempting common law regarding employee benefit plans). However, the express preemption provision of the Act does not preempt common law actions. *Cipollone II*, 789 F.2d at 185.

The Third Circuit found preemption in the absence of an explicit Congressional directive regarding preemption of common law remedies one way or the other.

Congress' statutory silence on the matter was accompanied by legislative history which, if it points in any direction, points to non-preemption. The congressional reports, debates and discussions regarding preemption are remarkable for their lack of clear intention to preempt common law actions. *See Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1159-63 (D.N.J. 1984) (*Cipollone I*) (reviewing legislative history). The only discussions of

common law claims seem to assume the continued existence of common law actions against cigarette manufacturers. For example, Congressman Fascell commented that the Act "in no way affects the right to raise the defense of 'assumption or [sic] risk' and the legal requirement for such a defense to prevail." 111 Cong. Rec. 16,543-544 (July 13, 1965) (quoted in *Cipollone I*, 593 F. Supp. at 1162). As *Cipollone I* observed, "all parties assumed the existence of lawsuits such as the instant one." 593 F. Supp. at 1163. Thus, Congress' preemptive intent is marked by statutory silence and no support in the legislative history.

The absence of evidence that Congress intended to preempt is also evident from the number of courts that have concluded that Congress did not intend to preempt state common law actions. *Cipollone I*, 593 F. Supp. at 1170, *rev'd*, *Cipollone II*, 789 F.2d 181; *Palmer v. Liggett Group, Inc.*, 633 F. Supp. 1171 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990). *Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tex. Ct. App. 1991).

B. Preemption Of Common Law Claims Against Cigarette Manufacturers Undermines Federalism And Violates The Separation Of Powers Doctrine.

The "basic assumption that congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), is an especially strong presumption when Congress legislates "in a field which the States have traditionally occupied . . . unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator*

Corp., 331 U.S. 218, 230 (1947) (emphasis added). *See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (court "not to conclude that Congress legislated the ouster of [a state statute] . . . in the absence of an *unambiguous congressional mandate* to that effect.") (emphasis added).

The non-preemption presumption reflects the Court's sensitivity to concerns regarding federalism. In various contexts, this Court has insisted on clarity of Congressional intent as a precondition of expanding federal power at the expense of important state interests. Thus, for example, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). Therefore, Congress must make its intention to abrogate the states' Eleventh Amendment immunity "unmistakably clear." *Id.* at 242.

In the context of reviewing state taxation power, the Court has stated that " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance'." *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-82 (1972) (citation omitted). In the context of state authority to regulate sales to the Federal Government, the Court has stated:

> An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous.

Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

> In deciding preemption issues:
>
> Our analysis of this problem must be guided by respect for the separate spheres of governmental authority preserved in our federalist system. Although the Supremacy Clause invalidates state laws that "interfere with, or are contrary to the laws of Congress . . . ," the " 'exercise of federal supremacy is not lightly to be presumed,' ". . . . As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) (citations omitted). Thus, the Court repeatedly interprets Congressional intent regarding preemption

> with the "presumption against finding preemption of state law in areas traditionally regulated by the States" and " 'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "

California v. Federal Energy Regulatory Commission, ___ U.S. ___, ___, 110 S. Ct. 2024, 2029 (1990) (citations omitted). In other words, "courts may not find state measures preempted in the absence of clear evidence that Congress so intended . . . . " *Id.* Furthermore, courts "must . . . give full effect to evidence that Congress considered and sought to preserve the States' coordinate regulatory role in our federal scheme." *Id.*

Here, clear evidence that Congress intended to preempt any common law claims against cigarette manufacturers is absent. Furthermore, there is evidence that Congress envisaged the continuation of common law claims against cigarette manufacturers by consumers after passage of the Act. See p.9-10, *supra*. This possibility did not disturb Congress. It did nothing to prevent continued common law claims, as it has done in other areas, by expressly preempting such claims.

Nor did Congress impliedly preempt common law claims. Nothing in the Act establishes a "structure and purpose," *FMC Corp. v. Holliday*, ___ U.S. ___, ___, 111 S. Ct. 403, 407 (1990), from which such an intent can be fairly implied. The two expressed purposes of the Act are (1) to adequately inform the public of adverse health effects of smoking and (2) to not impede commerce and the national economy with diverse, nonuniform and confusing cigarette labeling and advertising regulations. 15 U.S.C. § 1331(1) and (2) (1982 and Supp. 1984). Neither purpose is thwarted by the common law damages claims found to be preempted by the court below.

The provision of adequate health information is in no way impeded by the possibility that a manufacturer, spurred by a common-law damage claim, may choose to advise consumers of health hazards beyond the advice mandated by Congress. Furthermore, manufacturers are not required by common-law damages to comply with diverse, nonuniform or confusing labeling and advertising regulations. A common-law damage claim, if successful, provides an *incentive* to change behavior in a variety of ways but it does not *require* any behavior change other than paying a money judgment.

Divining a Congressional intent to preempt common law claims from what can most generously be described as Congressional silence fails to establish a sound basis for trammelling traditional state interests in providing opportunities for health regulation and compensation for injured citizens through common law actions. Therefore, "[a]ny indulgence in construction should be in favor of the states, because Congress can speak with drastic clarity whenever it chooses to assume full federal authority, completely displacing the states." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 780 (1947) (Frankfurter, J., separate opinion).

Reversal of the *Cipollone III* preemption determination is also required by the separation of powers doctrine. It is not the courts' role to make legislative choices where the legislature declines to make choices. *See United States v. Locke*, 471 U.S. 84, 95 (1985) ("the fact that Congress might have acted with greater clarity or foresight does not give courts *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."). Yet, in light of Congressional silence on the subject, that is exactly what would drive, or appear to do so, a conclusion by this Court that Congress intended to preempt common law claims.

This Court has shunned "judicially created limitations on federal power" to protect the states from federal inroads on vital state interests. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). Instead, the states are "more properly protected by procedural safeguards inherent in the structure of the federal system . . . . " *Id.* The court should similarly eschew judicially created expansion of federal power that trammels vital state interests. In this case, the federal system effectively protected the states by enacting

a regulatory scheme that preserves traditional state common law remedies to help protect health and provide compensation for injuries. A judicially created expansion of federal power at the state's expense, based on no more than silence or, at best, a very ambiguous expression of legislative intent, is an unjustified judicial intervention into the legislative arena.

CONCLUSION

For all the foregoing reasons, the Court should reverse the court below and hold that the Federal Cigarette Labeling and Advertising Art does not preempt state common law actions.

Dated: May 23, 1991.

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